

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 13, 1996

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1185

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

GREGORY WOLF,

Petitioner-Appellant,

v.

**LABOR AND INDUSTRY
REVIEW COMMISSION,
SINCLAIR AND VALENTINE, L.P.,
and FLINT INK CORPORATION,**

Respondents-Respondents.

APPEAL from an order of the circuit court for Waukesha County:
ROGER P. MURPHY, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Gregory Wolf has appealed from a circuit court order affirming an order of the Labor and Industry Review Commission (LIRC) which determined that Sinclair and Valentine, L.P. (Sinclair) did not discriminate against Wolf based on an actual or perceived mental or visual handicap when it laid him off from his employment with Sinclair and failed to recall him. We affirm the circuit court's order.

The administrative law judge (ALJ) who heard testimony in this case initially issued findings of fact and an order which found that Wolf's supervisor, Roger March, perceived him to be mentally impaired and that this was the motivating factor in Sinclair's decision to select Wolf for layoff and to fail to recall him. In its order dismissing Wolf's claim of handicap discrimination, LIRC indicated that it had consulted with the ALJ concerning the witnesses' credibility. After consulting with her, LIRC found that Sinclair's decisions to lay Wolf off and to decline to recall him were not based upon discriminatory motive, but instead were based upon Sinclair's decreasing business and Wolf's inability to perform additional job duties which could occupy an eight-hour work day.

Wolf contends that LIRC deprived him of due process when it engaged in an ex parte communication by consulting with the ALJ and by reversing the ALJ's findings regarding discriminatory motive without adequately explaining its reasons for doing so. He argues that LIRC should not have consulted with the ALJ because it had a complete record of the testimony and exhibits, and a detailed decision setting forth the ALJ's findings and conclusions. He contends that because LIRC had this information available and failed to identify any specific credibility issue on which consultation was required, the consultation was unnecessary and amounted to an improper ex parte communication.

We reject these arguments on several grounds. First, they are premised on the notion that LIRC may consult with the ALJ only when it intends to reverse the ALJ's decision based specifically on credibility grounds. This is not the law. In situations when an ALJ hears conflicting evidence and makes findings based upon the credibility of the witnesses and LIRC thereafter reverses the ALJ and makes contrary findings, the record must affirmatively show that LIRC had the benefit of the ALJ's personal impressions of the material witnesses. *Braun v. Industrial Comm'n*, 36 Wis.2d 48, 57, 153 N.W.2d 81, 85 (1967). However, LIRC is not restricted to consulting with the ALJ in only those situations where it intends to reverse based on credibility. LIRC may have a credibility conference in its discretion at any time with an ALJ, but is required to do so only as a condition precedent to overruling the ALJ. *Conradt v. Mt. Carmel Sch.*, 197 Wis.2d 60, 73, 539 N.W.2d 713, 718 (Ct. App. 1995). Moreover, the consultation between LIRC and the ALJ is not prohibited as an ex parte communication. *Rucker v. DILHR*, 101 Wis.2d 285, 290-92, 304 N.W.2d 169, 172-73 (Ct. App. 1981).

Consultation was not only permissible, but probably necessary, in this case based on LIRC's reversal of the ALJ's order. Consultation is required before reversal by LIRC whenever credibility of witnesses is involved. *Transamerica Ins. Co. v. DILHR*, 54 Wis.2d 272, 282, 195 N.W.2d 656, 662 (1972). Here, LIRC ultimately accepted most of the facts as found by the ALJ, but rejected the inference she drew from those facts; namely, that Sinclair was motivated by discriminatory factors. Since the determination of whether Sinclair's decisions were motivated by discriminatory reasons or lawful business concerns involved credibility considerations, consultation between LIRC and the ALJ was warranted, even if LIRC ultimately did not rely on any express finding as to credibility in reversing the ALJ's determination.

We also reject Wolf's argument that LIRC did not provide an explanation of its reasons for reversing the ALJ's decision. When witness credibility is involved, due process requires that LIRC submit a memorandum opinion explaining the basis for its decision if it reverses the ALJ's findings. *Hakes v. LIRC*, 187 Wis.2d 582, 587-88, 523 N.W.2d 155, 157-58 (Ct. App. 1994). However, LIRC, not the ALJ, remains the entity vested with the responsibility of making credibility determinations and finding the facts in the case. *Id.* at 589, 523 N.W.2d at 158. The law therefore does not require that LIRC's memorandum opinion delve into the mental processes it used in making its determinations of fact. *Id.* at 588, 523 N.W.2d at 158.

The decision issued by LIRC adequately set forth its reasons for reversing the ALJ's finding of discriminatory motivation and its dismissal of Wolf's claims. LIRC expressly found that Sinclair's decisions regarding layoff and recall were not discriminatorily motivated. It based that finding on facts found by both it and the ALJ regarding Sinclair's long history of working with Wolf, the previous efforts by plant superintendent March to train Wolf in different areas, and March's consultation with Wolf's father about training him to operate a milling machine.

Based on March's lengthy supervision of Wolf and his efforts to expand the number of jobs Wolf could do, LIRC found that March possessed the judgment and wisdom to fully appreciate Wolf's capabilities and limitations.

LIRC further found that when a layoff was required at the Sinclair plant because of decreased business, March compared Wolf to the other plant employees and determined that he was capable of performing the fewest number of jobs. Based on these findings, LIRC determined that Sinclair's decisions regarding layoff and recall were not based upon discriminatory motives, but instead were based upon Sinclair's decreased business and Wolf's inability to perform sufficient additional other job duties to fill an eight-hour day.

While it did not expressly discuss credibility, LIRC thus explained its reasons for setting aside the ALJ's findings and order and dismissing Wolf's claims. Due process requires nothing more. *Cf. id.* at 588-89, 523 N.W.2d at 158.

By the Court. – Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.